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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA
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9 THOMAS B. FERGUSON, individually;
10 CHRIS BESS, individually,

11 Plaintiffs,

12 vs.

13 FIRST AMERICAN SPECIALTY
14 INSURANCE COMPANY, a California
15 corporation; JOHN AND JANE DOES, I-
X; XYZ PARTNERSHIPS, I-X; ABC
CORPORATIONS, I-X,

16 Defendants.
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No. CV 09-01581-PHX-JAT

ORDER

19 Currently before the Court is Plaintiffs Thomas B. Ferguson and Chris Bess' Motion
20 to Remand. (Doc. #10). Defendant First American Specialty Insurance Company filed a
21 Response on August 21, 2009 (Doc. #17), and Plaintiffs filed a Reply on August 31, 2009.
22 (Doc. #19). For the reasons that follow, the Court grants Plaintiffs' Motion.

23 **I. Background**

24 Plaintiffs made a \$50,000 loan to Albert and Rene Mendoza for the purchase of a
25 residence in Maricopa County. The Mendozas obtained property insurance through
26 Defendant (policy no. AZPD109577). After the Mendozas defaulted on the loan, Plaintiffs
27 purchased the property at a trustee's sale on March 24, 2009 with a "full credit bid" in the
28 amount of \$59,484.93. Plaintiffs, who allege they were also insureds up to the amount of the

1 loan, brought an insurance claim for theft and vandalism as a third party beneficiary under
2 Defendant's policy. Defendant denied Plaintiffs' claim

3 On June 16, 2009, Plaintiffs commenced this action in the Maricopa County Superior
4 Court. (Doc. #1, Ex. A, Complaint). In their complaint, Plaintiffs allege breach of contract
5 and breach of the duty of good faith and fair dealing (bad faith). (*Id.*). Plaintiffs seek
6 compensatory, general, special and punitive damages, as well as attorney's fees and costs.

7 On July 31, 2009, Defendant removed the present case to this Court based on diversity
8 jurisdiction. (Doc. #1). Plaintiffs timely filed a Motion to Remand arguing that this Court
9 lacks subject matter jurisdiction because Defendant has not provided sufficient evidence to
10 establish that the amount in controversy exceeds \$75,000.

11 **II. Legal Standard**

12 "If at any time before final judgment it appears that the district court lacks subject
13 matter jurisdiction, the case shall be remanded." 28 U.S.C. § 1447(c). Moreover, when a
14 federal court is presented with a motion to remand, the court is limited solely to the question
15 of its authority to hear the case pursuant to the removal statute. *See Okot v. Callahan*, 788
16 F.2d 631, 633 (9th Cir. 1986). Thus, the Court's inquiry is limited to whether it has subject
17 matter jurisdiction over the instant case.

18 "[D]istrict courts shall have original jurisdiction of all civil actions where the matter
19 in controversy exceeds the sum or value of \$75,000, exclusive of interests and costs, and is
20 between . . . citizens of different States[.]" 28 U.S.C. § 1332(a)(1). Further, actions that
21 originally could have been filed in federal court may be removed to federal court by the
22 defendant. *Caterpillar v. Williams*, 482 U.S. 386, 392 (1987).

23 The removal statute provides in pertinent part: "[A]ny civil action brought in a State
24 court of which the district courts of the United States have original jurisdiction, may be
25 removed by the defendant . . . to the district court of the United States for the district and
26 division embracing the place where such action is pending." 28 U.S.C. § 1441(a). There is,
27 however, a "strong presumption" against removal, and "[f]ederal jurisdiction must be
28 rejected if there is any doubt as to the right of removal in the first instance." *Gaus v. Miles*,

1 980 F.2d 564, 566 (9th Cir. 1992) (citing *Libhart v. Santa Monica Dairy Co.*, 592 F.2d 1062,
2 1064 (9th Cir. 1979)). “The ‘strong presumption’ against removal jurisdiction means that
3 the defendant always has the burden of establishing that removal is proper.” *Gaus*, 980 F.2d
4 at 566.

5 “In a removed case . . . the plaintiff chose a state rather than federal forum. Because
6 the plaintiff instituted the case in state court, ‘there is a strong presumption that the plaintiff
7 has not claimed a large amount in order to confer jurisdiction on a federal court[.]’” *Singer*
8 *v. State Farm Mut. Auto. Ins. Co.*, 116 F.3d 373, 375 (9th Cir. 1997) (quoting *St. Paul*
9 *Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 290 (1938)). But, “[w]here the complaint
10 does not demand a dollar amount, the removing defendant bears the burden of proving by a
11 preponderance of the evidence that the amount in controversy exceeds [\$75,000].” *Singer*,
12 116 F.3d at 376 (citing *Sanchez v. Monumental Life Ins. Co.*, 102 F.3d 398, 404 (9th Cir.
13 1996)). “[R]emoval ‘cannot be based simply upon conclusory allegations’ where the
14 [complaint] is silent” as to the amount of damages the plaintiff seeks. *Singer*, 116 F.3d at
15 377 (quoting *Allen v. R&H Oil and Gas Co.*, 63 F.3d 1326, 1335 (5th Cir. 1995)). However,
16 the inquiry into the amount in controversy is not confined to the face of the complaint. *See*
17 *Valdez v. Allstate Ins. Co.*, 372 F.3d 1115, 1117 (9th Cir. 2004) (endorsing the Fifth Circuit’s
18 practice of considering facts presented in the removal petition as well as any “summary-
19 judgment-type evidence relevant to the amount in controversy at the time of removal.”).

20 **III. Analysis**

21 **A. Motion to Remand**

22 Plaintiffs do not demand a particular dollar amount in their complaint. Accordingly,
23 it is Defendant’s burden to prove by a preponderance of the evidence that the amount in
24 controversy exceeds \$75,000. *Singer*, 116 F.3d at 376. This requires that Defendant submit
25 evidence to show it is more likely than not that the amount in controversy exceeds \$75,000.
26 *Sanchez*, 102 F.3d at 404. Defendant may submit summary-judgment-type evidence relevant
27 to the amount in controversy at the time of removal, but may not rely upon conclusory
28 allegations. *Valdez*, 372 F.3d at 1117.

1 Evidence submitted by Defendant to prove that the amount in controversy exceeds
2 \$75,000 includes the certificate regarding compulsory arbitration from Maricopa County
3 Superior Court (Def. Ex. 2); an estimate amounting to \$63,954.96 that Plaintiffs obtained for
4 the potential repair costs at the property from Steve Reiswig of Magnus Construction (Def.
5 Ex. 3); e-mail correspondence in which Steve Reiswig indicated that additional work costing
6 “tens of thousands of dollars” would be incurred if action were not taken immediately (Def.
7 Ex. 4); a letter drafted by Plaintiff’s previously retained counsel to Defendant stating
8 damages would be higher than Reiswig’s estimate and that the “final bill will be an element
9 of [Plaintiffs’] damages” (Def. Ex. 5); an affidavit of Defendant’s attorney attesting to the
10 amount of attorneys’ fees likely to be incurred in this case and potential punitive damages
11 (Def. Ex. 6). As discussed below, this evidence is not sufficient to prove by a preponderance
12 of the evidence that the amount in controversy in this case exceeds \$75,000.

13 First, the certificate regarding compulsory arbitration does nothing more than establish
14 that the amount in controversy is likely more than \$50,000. The Court may consider this
15 certificate as a concession by Plaintiffs of the amount that they are seeking for their claim.
16 *See Ansley v. Metro. Life Ins. Co.*, 215 F.R.D. 575, 578 (D. Ariz. 2003) (citing *Singer*, 116
17 F.3d at 376). Maricopa County Superior Court local rule 3.10 requires arbitration for claims
18 under \$50,000. However, while the certificate establishes that Plaintiffs are very likely
19 seeking an amount that is more than \$50,000 for their claim, the certificate does not prove
20 that the amount in controversy is greater than \$75,000.

21 Second, the estimation of present and future damages to the property (Def. Ex. 3), the
22 e-mail indicating “tens of thousands of dollars of additional work” if action was not taken
23 immediately (Def. Ex. 4), and the letter drafted by Plaintiffs previously retained counsel to
24 Defendant stating damages would be higher than Reiswig’s estimate and that the “final bill
25 will be an element of [Plaintiffs’] damages” (Def. Ex. 5) are, at most, factors in determining
26 punitive damages, not the actual damages under the policy. Plaintiff concedes in their
27 Motion to Remand that as third-party beneficiaries they were also insureds of Defendant up
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1 to the amount of the mortgage, which was \$50,000. (Doc. #10).¹ An insurer's policy limits
 2 are "relevant to determining the amount in controversy only if the validity of the entire
 3 insurance policy is at issue, or if the value of the underlying . . . claims exceeds the [policy
 4 limit]." *Budget Rent-A-Car, Inc. v. Higashiguchi*, 109 F.3d 1471, 1473 (9th Cir. 1997)
 5 (citations omitted). *See also State Farm Mut. Auto. Ins. Co. v. Narvaez*, 149 F.3d 1269, 1271
 6 (10th Cir. 1998) ("Where insurance coverage is denied, the maximum 'amount in controversy
 7 is the maximum limit of the insurer's liability under the policy.") (citations omitted).
 8 Therefore, Plaintiff concedes they are only entitled up to \$50,000 under the policy, which is
 9 below the jurisdictional minimum unless Defendant can show by a preponderance of the
 10 evidence that punitive damages and attorney's fees are likely to exceed \$25,000.

11 Third, Defendant's attorney's estimation of the attorneys' fees in this case through an
 12 affidavit (Def. Ex. 6) is not sufficient to find that the amount in controversy exceeds \$75,000.
 13 Defendant correctly asserts that attorneys' fees recoverable under law may be included in
 14 computing the amount in controversy when an underlying statute authorizes such fees. *Galt*
 15 *G/S v. JSS Scandinavia*, 142 F.3d 1150, 1156 (9th Cir. 1998). Attorneys' fees may be
 16 awarded the successful litigant in a bad faith action since bad faith arises out of contract.
 17 *Noble v. Nat'l Am. Life Ins. Co.*, 128 Ariz. 188, 190, 624 P.2d 866, 868 (1981); *Sparks v.*
 18 *Republic Nat'l Life Ins. Co.*, 132 Ariz. 529, 544, 647 P.2d 1127, 1142 (1982). *See also*
 19 *Nahom v. Blue Cross & Blue Shield of Arizona, Inc.*, 180 Ariz. 548, 559, 885 P.2d 1113,
 20 1124 (App. 1994). In prior cases in this district the Court has held that an affidavit by defense
 21 counsel in a bad faith case estimating the amount of attorneys fees plaintiff's may incur and
 22 later claim is too speculative to suffice for purposes of calculating the \$75,000 threshold.

24 ¹Defendant argues in their Reply that the estimate amount of \$63,954.96 obtained from Reiswig in
 25 Def. Ex. 3 is what should be used to calculate the amount in controversy. Defendant also argues that the
 26 amount in controversy should be increased since Reiswig indicated that additional work costing "tens of
 27 thousands of dollars" would be incurred if action were not taken immediately. (Def. Ex. 4).

28 While the Court disagrees that these estimates should be used, even if the Court were to use them,
 Defendant would still not meet the amount in controversy. The additional expenses are far too speculative
 to give them substantial merit in calculating the amount in controversy. There is no evidence presented to
 the Court as to what, if any, additional expenses have been incurred, and it is Defendant's burden to present
 such evidence.

1 *See Burk v. Med. Sav. Ins. Co.*, 348 F. Supp. 2d 1063, 1068 (D. Ariz. 2004) (“Attorney’s fees
2 incurred in obtaining the benefits of an insurance contract are recoverable in a bad faith
3 action but the recoverable fees include only those incurred to obtain the contract benefits and
4 not fees incurred in seeking tort damages.”) (citing *Schwartz v. Farmers Ins. Co. of Ariz.*, 800
5 P.2d 20, 22-23 (Ariz. Ct. App. 1990)); *Bruemmer v. Hartford Accident & Indem. Co.* 2007
6 WL 1063164,3 (D. Ariz. 2007) (also citing *Bruemmer*). It should be noted, as a clarification,
7 that in *Schwartz* the court was ruling on an evidentiary matter in the underlying bad faith case
8 where the claimant sought to introduce evidence of attorneys fees incurred in obtaining
9 contract benefits as part of his compensatory damages. This should not be confused with the
10 right the prevailing party has, after trial, to apply pursuant to ARS § 12-341.01(A) for all
11 attorneys fees incurred in litigating the bad faith case.

12 In his affidavit, counsel for Defendant fails to cite a single case in support of what
13 attorney’s fees are likely to be in a case that has similar facts and allegations to the present
14 case. Furthermore, while counsel’s affidavit discusses what potential work the attorneys
15 might reasonably engage in, the estimated hourly billing rate and number of hours required
16 to achieve that work are simply too speculative. As a result, Defendant simply does not meet
17 its burden in proving that the reasonable cost of attorney’s fees satisfies the amount in
18 controversy.

19 Finally, Defendant has not established by a preponderance of the evidence that any
20 punitive damages in this case are likely to exceed \$75,000. Punitive damages recoverable
21 under law may be included in computing the amount in controversy. *Gibson v. Chrysler*
22 *Corp.*, 261 F.3d 927, 945 (9th Cir. 2001). Under Arizona law, punitive damages may be
23 awarded in bad faith insurance cases. *Filasky v. Preferred Risk Mut. Ins. Co.*, 734 P.2d 76,
24 83 (Ariz. 1987). “However, the mere possibility of a punitive damages award is insufficient
25 to prove that the amount in controversy requirement has been met.” *Burk*, 348 F. Supp. 2d
26 at 1069 (citing *Surber v. Reliance Nat’l Indem. Co.*, 110 F.Supp.2d 1227, 1232 (N.D. Cal.
27 2000)). To show that a claim for punitive damages establishes that it is more likely than not
28 that the amount in controversy exceeds \$75,000, Defendant must present appropriate

1 evidence. *Burk*, 348 F. Supp. 2d at 1069 (citing *McCaa v. Mass. Mut. Life Ins. Co.*, 330 F.
2 Supp. 2d 1143, 1149 (D. Nev. 2004)). Such evidence may include jury verdicts in analogous
3 cases. *Burk*, 348 F. Supp. 2d at 1069 (citing *Simmons v. PCR Tech.*, 209 F. Supp. 2d 1029,
4 1033 (N.D. Cal. 2002)), and *Ansley*, 215 F.R.D. at 578).

5 Here, Defendant does not present any jury verdicts from analogous cases. Counsel's
6 affidavit (Def. Ex. 6) simply states that he is unaware of a single reported Arizona case
7 decided in the last 15 years in which a punitive damages award did not exceed \$75,000. This
8 exact assertion was dealt with in *Burk*, where the court concluded that the defendant could
9 not prove they are likely to receive such an award without citation to a single case. *Burk*, 348
10 F.Supp. at 1069. Not only is there a failure to "compare the facts of [p]laintiff's case with
11 the facts of other cases where punitive damages have been awarded in excess of the
12 jurisdictional amount, [defendant] failed even to cite any such cases." *Id.* at 1070. Therefore,
13 this Court agrees with the court in *Burk*, and finds that Defendant in the present case has
14 failed to meet its burden in proving by a preponderance of the evidence that punitive
15 damages exceed the jurisdictional minimum.

16 Defendant, given all of the evidence submitted and when considered together, fails
17 to prove by a preponderance of the evidence that the value of Plaintiffs' claim exceeds
18 \$75,000. Accordingly, in light of the strong presumption against removal jurisdiction, the
19 Court concludes that it lacks subject matter jurisdiction over this action.

20 **B. Request for Stipulation**

21 In the alternative, and in the event the Court remands this case to state court,
22 Defendant contends that Plaintiffs must stipulate to the fact that their damages do not exceed
23 \$75,000. Specifically, Defendant contends that if Plaintiffs are unwilling to cap their
24 damages at \$75,000, then their motion to remand is unreasonable and not brought in good
25 faith. A motion to remand is quite an anomaly. As one court witnessed the comic scene:
26 "plaintiff's personal injury lawyer protests up and down that his client's injuries are as minor
27 and insignificant as can be, while attorneys for the [defendant] paint a sob story about how
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1 plaintiff's life has been wrecked.” *Shaw v. Dow Brands, Inc.*, 994 F.2d 364, 366 (7th Cir.
2 1993).

3 However, the Court disagrees with Defendant’s argument. The burden is on the
4 defendant to prove the amount in controversy. *See Singer*, 116 F.3d at 376. As such,
5 Plaintiffs “need not stipulate to limit their future remedies to prevent Defendant’s removal
6 to federal court.” *Burk*, 348 F. Supp. 2d at 1070.

7 Accordingly,

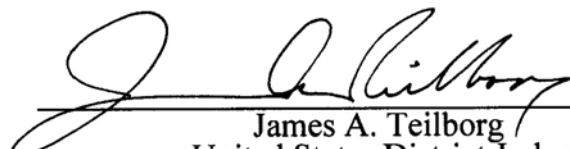
8 **IT IS ORDERED** that Plaintiffs’ Motion to Remand (Doc. # 10) is **GRANTED**.

9 **IT IS FURTHER ORDERED** that Plaintiffs’ Motion to Dismiss Fictitious Parties
10 (Doc. # 8) is denied as moot.

11 **IT IS FURTHER ORDERED** that Defendant’s Request for Rule 16 Conference
12 (Doc. # 14) is denied as moot.

13 **IT IS FURTHER ORDERED** that this case is remanded to the Superior Court for the
14 State of Arizona, in and for the County of Maricopa.

15 DATED this 23rd day of November, 2009.

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18 James A. Teilborg
United States District Judge
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